

'Aviation Safety' under International Civil Aviation Law



Law

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ABSTRACT

Civil aviation is a major industry providing rapid transportation and other high value services for the general public around the world. It plays a vital role in facilitating economic growth, trade and tourism. Commercial air transportation alone involves over 22,000 aircraft carrying over 2.2 billion passengers annually. The total value of goods transported by air represents 35% of all international trade. Over 40% of international tourists travel by air. Civil aviation is also a major employer, providing 32 million jobs globally, including 5.5 million of direct jobs in the airline and airport industry and civil aeronautical sector.¹ Air transport is also relatively safe compared to other modes of transport. In most regions of the world air accidents have become rare to the point that they make news headlines. Globally the number of passenger fatalities per 100 million passenger-kilometres flown in commercial air transport has fallen from 0.8 in 1960 to 0.08 in 1980, 0.03 in 1990 and has ranged between 0.05 and 0.01 since then.² The author attempts to analyze the safety oversight and enforcement in civil aviation with regard to the international nature of civil aviation and the dynamic concept of safety in civil aviation.

Introduction:

Despite that, ensuring effective implementation and most importantly enforcement of safety standards is still one of the biggest challenges for the international aviation community. There are over 10,000 standards and recommended practices (SARPS) consolidated into 18 Annexes to the Chicago Convention³ - the vast majority of them concerning civil aviation safety. At the same time the average worldwide level of implementation of these standards is estimated at around 60.5%.⁴ Safety levels are also far from being uniform across the globe (see Figure 1 above)⁵ and there are concerns that as the air traffic and complexity of the air transport market grow the number of accidents may increase.⁶ Why after more than 60 years of concerted efforts of States and industry, only 60% of international safety standards in civil aviation are properly implemented and the levels of harmonisation vary so significantly across the globe? The easiest and probably the most common answer given to this question would be: lack of resources. It cannot be denied that when accident rates in civil aviation for various regions are compared with their respective GDP levels, the correlation is there. However, safety oversight and enforcement is a complex domain encompassing various disciplines and numerous actors at both national and international level. Legal, institutional and policy factors, next to financial resources, play a fundamental role in this respect. Many States do not have the volume and scope of aviation activities which generate the resources and the base-line activity necessary to support a workable safety oversight system. In such a situation, a regional approach could provide access to the necessary expertise and help overcoming financial difficulties. While these advantages are most evident for smaller and/or developing States, they can equally apply to bigger and/or more developed States. The advantages of establishing regional safety cooperation also apply to areas related to the provision of air traffic services, and accident and incident investigation.⁷ Benefits of regional approach to safety oversight in civil aviation are recognised by ICAO⁸ and regional safety oversight organisations present, in many forms, in various parts of the world, including in Europe, Central America or Africa.

Regulations on aviation safety and its enforcement:

Enforcement of aviation safety standards in the international context Multilateralism characterised regulation of aviation safety from the very beginning of human activity in the air. The first international congresses and conferences dedicated to regulatory aspects of aviation were organised as early as in the XIX century. The first multilateral Convention dealing with air navigation was the Paris Convention of 13 October 1919 – it established a number of basic principles, such as the nationality of aircraft and set mandatory safety and customs standards contained in eight annexes. However, it was only since the adoption of the Chicago Convention and establishment of ICAO, that States started to closely cooperate in regulating and overseeing the development of civil aviation on a global scale. At the same time, until the recent two decades,

enforcement of aviation safety in the multilateral context was almost non-existent. This triggered the appearance of various national or regional initiatives such as the US International Aviation Safety Assessment Programme (IASA) in 1992, Safety Assessment of Foreign Aircraft (SAFA) in Europe in 1996, and ultimately led to the launch of ICAO's Universal Safety Oversight Audit Programme (USOAP) in 1999, which since 2005 has been substantially strengthened (in particular, under the current comprehensive approach the audits cover all safety-related Annexes to the Chicago Convention and the results of the audits are made available to all the Contracting States) and is expected to be further revised before the end of the current audit cycle in 2010. By acceding to the Chicago Convention, States assume certain responsibilities vis-à-vis other Contracting Parties, in particular for ensuring compliance with the applicable SARPS and putting in place a robust safety oversight system allowing to identify and appropriately address any identified safety concerns. At the same time, in view of the fact that international law proceeds from the concept of "sovereignty", its enforcement is very different from enforcement of law in the domestic context. This is also the case for international air law, where ensuring execution of treaty obligations of States in a number of cases still has to rely both on diplomatic efforts as well as on the ability to take legally binding enforcement actions. The effectiveness of ICAO, as an organisation responsible for overseeing implementation of international standards on the global level, is also often discussed in this respect.⁹

It is estimated that about 70% of all ICAO Member States participate in one or another form of regional civil aviation safety programmes or organisations. The level of integration amongst these groups varies substantially from supranational organisations with regulatory and enforcement powers such as the European Union (with dedicated civil aviation regulatory framework and European Aviation Safety Agency) through intergovernmental organisations such Eurocontrol in Europe or ACSA in Central America to arrangements of purely technical nature such as various COSCAP initiatives. Regional civil aviation accident investigation bodies are also present. ICAO explicitly recognises the potential benefits of regional cooperation in safety oversight and of collective discharge of State's obligations under the Chicago Convention and issued specific guidance material in that respect. Regional initiatives involve harmonisation of standards, development of common procedures, training of auditors and even collective discharge of international obligations undertaken by States under the Chicago Convention, including with respect to safety oversight, thus allowing for more efficient utilisation of limited resources, economies of scale and development of harmonised approaches to aviation safety. They can be a powerful tool to reduce cost and promote uniformity of oversight. In the international arena, the existence and effective operation of regional organisations is a demonstration of regional solidarity in pursuing common goals and objectives, sometimes despite possible differences at the higher political level. Although the benefits

deriving from participation in regional cooperation are widely recognised, building an efficient regional safety oversight organisation or programme in civil aviation is not an easy task. Effective regional cooperation requires an appropriate organisational and governance structure. Resources must be also mobilised to build the organisation (although usually it will be relying on the assets of the participating states). If the regional organisation is to be empowered with rulemaking, oversight or most importantly law enforcement tasks, the issue of delegation of responsibilities by the States to the organisation must be also adequately addressed. This has numerous dimensions. First of all the basic principle “*nemo plus iuris transferre potest quam ipse habet*”, implies that the delegated body could not have a greater power than possessed by the delegating States. Specific limitations deriving from regional arrangements may also have to be observed.¹⁰ The matter of international legal personality of regional organisations arises, as well as their responsibility for safety functions under international law when they act on behalf of their member States (for example in the context of the European Union, EASA is discharging on behalf of the EU member states certain tasks and functions envisaged under the Chicago Convention but does not have a legal personality). Regional safety organisations can cooperate between themselves or even invite to cooperation interested “third countries”, which is the case for example with the Common Aviation Area initiative of the EU. One could also question whether an overlap could occur between the mandate of regional organizations and ICAO, and if so whether this creates conflicts regarding safety regulation, oversight and enforcement or are the functions of ICAO and regional organisations complementary.¹¹

Cooperation between the European Community and ICAO on aviation security audits / inspections and related matters (17 September 2008), which allows ICAO to verify compliance with relevant ICAO standards by assessing the European Commission inspections of national appropriate authorities of EU Member States, rather than visiting every Member State directly

Conclusion:

Effective implementation and enforcement of safety standards in civil aviation still poses a major challenge for a significant number of States all over the world. Regional cooperation has big potential in helping States in more effective discharge of their safety related obligations under the Chicago Convention and further improvement of safety record in air transport. Regional cooperation can have various forms and intensities depending on the particular political context and needs of the countries involved. In each case a number of preconditions must be met in order for the regional cooperation to fully unleash its potential. Ultimately, and similarly to the situation at the national level, its effectiveness will depend on enforcement and supervision powers of the regional organisation. The relationship between the global and regional cooperation has also yet to be established.

References:

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8. ICAO Safety Oversight Manual, Part B “The Establishment and Management of a Regional Safety Oversight System, Doc 9734, First Edition 2006.
9. Gilbert Guillaume, ICAO at the Beginning of the 21st Century, Air & Space law, vol. xxxiii/4-5 (2008); Onidi Olivier, A Critical Perspective on ICAO, Air & Space law, vol. xxxiii/1(2008);
10. In the context of the European Community (EC) the principles of delegation must not distort the institutional balance of the EC Treaty and division of competences between the Community institutions. In accordance with the principles of the EC Treaty and established case-law of the Court of Justice of the European Communities, a body which is not foreseen in the EC Treaty cannot be endowed with discretionary powers implying a large margin of political appreciation. In particular such bodies are not entitled to adopt rules of general application. When given decision-making powers, these must be strictly limited to applying clearly defined rules of secondary legislation to individual cases (i.e. issuance of type certificates by EASA for example), see Judgment of 13.06.1958, in case 9/58, Meroni, ECR, 1958, p.11; judgment of 14.05.1981, in case 98/80, Romano, ECR 1981, p.1241
11. In the area of security, the European Community and ICAO signed a Memorandum of